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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SAUL RICKS, JR., Defendant and Appellant.	E070937 (Super.Ct.No. FVI17002883) OPINION

APPEAL from the Superior Court of San Bernardino County. Eric M. Nakata, Judge. Affirmed.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and A. Natasha Cortina and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Saul Ricks, Jr. strangled his girlfriend to death because he thought she was cheating on him. As a result, he was found guilty of second degree murder (Pen. Code, § 187, subd. (a)) and sentenced to 15 years to life in prison.

In this appeal, defendant contends that the trial court erred by failing to define "provocation" for purposes of voluntary manslaughter. We will hold that "provocation," as used in the voluntary manslaughter instruction, has its ordinary English meaning; the instruction itself goes on to explain the additional requirements that provocation must meet to be legally adequate. Hence, the trial court was not required to define it.

I

FACTUAL BACKGROUND

Defendant lived with his girlfriend, Veda Mims, in an apartment in Victorville.

In the evening of October 8, 2017, defendant sent Mims several angry text messages. One of them said, "You talking about you're at the store, but been to the store all day long. You're . . . full of s***."

On October 9, defendant got into a collision while driving Mims's car. He tried to walk away from the scene, but officers soon caught up with him. He told them he wanted to die, adding, "Come on. Kill me." He also threatened the officers, putting one hand into his hoodie and asking, "Which one of you wants to go first?" He was arrested, then cited for driving under the influence and hit-and-run and released.

On the night of October 12-13, Mims's sister reported Mims as missing. She had not heard from Mims since October 7.

The police went to Mims's apartment and found her dead body lying on the kitchen floor. Next to it were the pieces of a broken wall clock.

The cause of death was manual strangulation. Mims's hyoid bone was broken, a "classic" sign of strangulation. To cause death, strangulation must continue for at least a minute and perhaps for as much as ten minutes.

Mims also had broken ribs and a broken breastbone. One of her neck vertebrae was broken. She had been struck in the face and head. Strangulation could not have caused the broken neck. CPR could have caused the broken ribs; however, neither a fall nor CPR could have caused the broken hyoid bone.

On October 18, the police located defendant in Oklahoma and interviewed him there.

Defendant told police he had been shot in the head perhaps 15 years earlier. As a result, he suffered from seizures, poor memory, mood swings, and "attitudes."

Defendant had known for two or three weeks that Mims was cheating on him. He heard her talking to other men on the phone when she thought he was asleep. She would wait for him to go to sleep, then leave and go to "[s]ome dude['s] house." Also, she "slipped up" and "accidentally" told him about "some dude."

On the day she died, they got into a "heated argument." When Mims got home, she claimed first that she had been at the store and then that she had been at her sister's house. Defendant did not believe her. He accused her of cheating on him; she denied it. They did not punch each other, but they did "bump[] faces"

Eventually, defendant went to the bedroom, while Mims stayed in the kitchen. She yelled his name; then he heard a noise — "boom-ba-doom" — that could have been her falling and hitting something. He was still angry, so he stayed in the bedroom. About five minutes later, he went out to the kitchen and found her lying on the floor, not moving. He thought maybe she had a seizure. He tried to give her CPR. He "panicked" and left because "[he] knew [he] was gonna get the blame . . . ."

When the police said his story was inconsistent with Mims's injuries, defendant added that he also "pushed her hard on her neck," but she did not fall. Later, however, he said she did fall when he pushed her neck, although "she got right back up."

II

FAILURE TO DEFINE "PROVOCATION"

A. *Additional Factual and Procedural Background*.

In addition to murder, the trial court instructed on voluntary manslaughter on a heat of passion theory. Thus, it gave CALCRIM No. 570, which stated:

"A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion.

"The defendant killed someone because of sudden quarrel or in the heat of passion if:

"1. The defendant was provoked;

"2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; and

"3. The provocation would have caused a person of average disposition to act rashly and without due deliberation[, t]hat is, from passion rather than from judgment.

"Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection.

"In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.

"It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. In deciding whether the provocation was sufficient, consider whether a person of average disposition[,] in the same situation and knowing the same facts[,] would have reacted from passion rather than from judgment.

"If enough time passed between the provocation and the killing for an ordinary person of average disposition to 'cool off' and regain his clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis.

"The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder."

During its deliberations, the jury asked for extra copies (one for each juror) of the instructions on first degree murder, second degree murder, and voluntary manslaughter.

B. *Discussion*.

"'When a word or phrase "'is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to its meaning in the absence of a request.'" [Citations.]' [Citation.] It is only when a word or phrase has a 'technical, legal meaning' that differs from its 'nonlegal meaning' that the trial court has a duty to clarify it for the jury. [Citation.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 670.)

The relevant nonlegal meaning of "provocation" is "[t]he action of provoking or exciting anger, resentment, or irritation, esp. deliberately; action, speech, etc., that provokes strong emotion; an instance of this." (Oxford Engl. Dict. Online (2019) <http://oed.com>, definition 2.a, as of Aug. 19, 2019.) CALCRIM No. 570 makes it clear that it is using provocation in this ordinary, nonlegal sense by stating, "no specific type of provocation is required . . . ."

To the extent that provocation must meet other, additional requirements in order to reduce murder to voluntary manslaughter, those requirements are stated in CALCRIM No. 570 — i.e., the provocation must be such as would cause a person of average disposition to act from passion rather than from judgment; slight or remote provocation is not sufficient; the defendant must act under the direct and immediate influence of the provocation, and so on. In other words, while "provocation" does have a technical, legal

meaning, CALCRIM No. 570 conveys that meaning by starting with the ordinary, dictionary meaning of provocation and then qualifying it in the necessary ways.

Defendant complains that CALCRIM No. 570 refers to "provocation as I have defined it," yet it fails to include a definition of provocation. This refers, however, to the additional requirements stated in CALCRIM No. 570 for provocation to reduce murder to voluntary manslaughter.

Defendant does not specify any different or additional definition that he thinks the trial court should have given. He merely argues that CALCRIM No. 570 did not adequately convey the principle that "words and insults on the subject of infidelity can . . . constitute adequate provocation."[1]

We acknowledge that words alone can rise to the level of adequate provocation. (*People v. Valentine* (1946) 28 Cal.2d 121, 137-144.) As already noted, however, the dictionary definition of "provocation" includes "speech," and the trial court told the jury that "no specific type of provocation is required . . . ." Thus, the jurors would have understood that adequate provocation can consist of words. If defendant felt the

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[1] We question whether this principle was even relevant, given the facts. Defendant did not tell the police that Mims provoked him with words or insults. During their argument, he accused her of infidelity, but she denied it. At most, at some unspecified time, Mims "slipped up" and said something about "some dude," indicating (to defendant, at least) that she was unfaithful. However, defendant told police the immediate cause of the argument was that, as he saw it, Mims had just come back from "sneaking out of the house" to see other men.

instruction was incomplete or too general, he should have requested a clarifying instruction. (*People v. Buenrostro* (2018) 6 Cal.5th 367, 428.)

Defendant relies on *People v. Le* (2007) 158 Cal.App.4th 516. There, as here, the trial court gave CALCRIM No. 570; however, it also gave CALCRIM No. 917, which stated: "'Words, no matter how offensive, and acts that are not threatening, are not enough to justify an assault or battery.'" (*Le*, *supra*, at pp. 523-524.) Moreover, during its deliberations, the jury asked, "'We could not find a definition of provocation in the jury instructions. How is provocation legally defined?'" (*Id*. at p. 524.) The trial court responded, "'Provocation may be anything that arouses great fear, anger or jealousy. Webster's Dictionary defines it as follows: "To cause anger, resentment, or deep feeling in; to cause to take action; to stir action."'" (*Id*. at p. 525.)

The appellate court held that the trial court erred by giving CALCRIM No. 917 in a homicide case. (*People v. Le*, *supra*, 158 Cal.App.4th at pp. 525-529.) It did *not* hold that the trial court erred by giving the dictionary definition of provocation. It merely observed that the jurors' question showed that they were confused about provocation, and that the trial court's response did not tend to cure the error in giving CALCRIM No. 917. (*Id*. at p. 526.) Thus, *Le* does *not* stand for the proposition that, whenever the trial court gives CALCRIM No. 570, it must also define provocation. Here, of course, the trial court did not give CALCRIM No. 917, so *Le* does not apply.

Finally, defendant claims that the prosecutor, in closing argument, misstated the relevant law.

The prosecutor said: "As the law states, the defendant cannot set up his own standard of conduct to be provoked. The standard is a person of average disposition, not an average jealous boyfriend. . . . [T]hat is not what a reasonable person would do, would be to kill someone because their girlfriend came home late, or was hanging up the phone in their face, or not answering their text messages, or wearing lingerie that matched."

On rebuttal, she also said: "He cannot set up his own standard of provocation. . . . How often does that happen in a relationship where a woman is not answering their cell phone or they're out or maybe their boyfriend suspects them of cheating? That happens a lot, and we would have a lot more murders; right?"

She continued: "A person of average disposition. Would the average person kill someone, kill their girlfriend, someone that they're supposed to love and protect, because they were hanging up in their face, because they came home late, because they were suspecting they were cheating?"

We agree that this misstated the law. "[P]rovocation is not evaluated by whether the average person would *act* in a certain way: to kill. Instead, the question is whether the average person would *react* in a certain way: with his reason and judgment obscured." (*People v. Beltran* (2013) 56 Cal.4th 935, 949.) Defense counsel, however, forfeited any contention that the prosecutor's argument was reversible error by failing to object and to request an admonition. (*People v. Caro* (2019) 7 Cal.5th 463, 510.)

As a result, defendant is asserting instructional error only. However, the prosecutor was in no way exploiting any error in the instructions. CALCRIM No. 570 correctly stated — twice — that the provocation must be such as would cause a person of average disposition to act from passion rather than judgment. It also stated that the defendant must have killed as a result of, and while under the influence of, the provocation. However, it never stated that the provocation must be such as would cause a person of average disposition to kill.

We also note that the only instructional error that defendant has identified is the failure to specify that words can constitute adequate provocation. The prosecutor, however, never argued that words *cannot* constitute adequate provocation. Rather, she was making a completely different point — that the test of the legal adequacy of the provocation is whether it would provoke a person of average disposition to kill — which was not only erroneous, but contrary to CALCRIM No. 570.

We therefore conclude that the trial court did not err by failing to give some additional definition of provocation.

III

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

FIELDS
J.